

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS METROPOLITAN
POLICE DEPARTMENT,
Appellant/Cross-Respondent,

vs.

AMERICAN BROADCASTING
COMPANIES, INC.; THE ASSOCIATED
PRESS; CABLE NWES NETWORK,
INC.; CHESAPEAKE MEDIA I, LLC,
D/B/A KSNV-TV; LOS ANGELES
TIMES COMMUNICATIONS, LLC;
THE NEW YORK TIMES COMPANY;
SCRIPPS BROADCASTING
HOLDINGS, LLC; WP COMPANY,
LLC, D/B/A THE WASHINGTON POST,

Respondents,

LAS VEGAS REVIEW-JOURNAL,
Respondent/Cross-Appellant.

Electronically Filed
Dec 06 2018 11:59 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

SUPREME COURT CASE NO.:
75518

RESPONDENT/CROSS-APPELLANT LAS VEGAS REVIEW-JOURNAL'S
ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-
APPEAL

APPEAL FROM EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY
THE HONORABLE STEFANY MILEY, DISTRICT JUDGE
DISTRICT COURT CASE NOS.: A764030; A764169

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

Respondent the Las Vegas Review-Journal is a Delaware corporation registered in the State of Nevada as a foreign corporation. The Las Vegas Review-Journal does not have any parent company, and no publicly held corporation owns ten percent or more of the Las Vegas Review-Journal's stock.

The law firm whose partners or associates have or are expected to appear for the Las Vegas Review-Journal is MCLETCHIE LAW.

DATED this 5th day of December, 2018.

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TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE	ii
TABLE OF AUTHORITIES	vii
I. JURISDICTIONAL STATEMENT	1
II. ROUTING STATEMENT	2
III. ISSUES PRESENTED FOR REVIEW.....	3
IV. STATEMENT OF THE CASE AND SUMMARY OF THE ARGUMENT	4
V. THE NPRA MANDATES LIBERAL CONSTRUCTION.....	7
VI. STANDARDS OF REVIEW	9
VII. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND.....	10
A. THE RECORDS REQUESTS.....	10
1. October 2, 2017 Requests.....	10
2. October 15, 2017 Request	12
B. THE LITIGATION IN DISTRICT COURT.....	12
C. THE DISTRICT COURT’S ORDERS	13
1. The Disclosure Order	13
2. The Costs Order.....	15
D. THE MEDIA LITIGANTS’ EFFORTS TO NARROW REQUESTS AND REDUCE COSTS	17
E. METRO’S GENERAL RELEASES OF RECORDS	19

F. FURTHER LITIGATION REGARDING COMPLIANCE.....	22
VIII. LEGAL ARGUMENT	23
A. METRO’S APPEAL IS MOOT.	23
1. Legal Standard for Dismissal of Appeals for Mootness.	24
2. Metro’s Claims Regarding BWC Footage Are Moot.	25
3. Metro’s Claims Regarding Extraordinary Use Fees Are Moot.	27
4. The Issues Metro Appeals Are Not Capable of Repetition, Yet Evading Review.	28
B. THE DISTRICT COURT CORRECTLY REQUIRED PRODUCTION OF BODY WORN CAMERA FOOTAGE.	30
1. Metro Waived Its Claims Regarding Production of Body Worn Camera Footage by Failing to Comply With the Disclosure Order.....	30
2. The Plain Language of NRS 289.830 Permitted the District Court to Order Metro to Produce the BWC Footage.....	33
3. The District Court’s Order Comports With the Purpose of NRS 289.830.....	35
4. The District Court’s Order to Redact BWC Footage Comports With the NPRA.	38
C. METRO HAS WAIVED ITS RIGHT TO RECOVER ANY EXTRAORDINARY USE FEES.	39
D. METRO CANNOT OBTAIN COSTS FROM THE MEDIA LITIGANTS BECAUSE DOING SO WOULD VIOLATE EQUAL PROTECTION AND THE FIRST AMENDMENT.....	41

///

E. THE DISTRICT COURT CORRECTLY INTERPRETED NRS 239.055 TO LIMIT METRO’S EXTRAORDINARY USE FEES.	43
1. The Costs Metro Seeks Are Not Even “Actual Costs” Under the NPRA, and Therefore Cannot Be Costs for “Extraordinary Use.”	43
2. The NPRA Does Not Allow for Hourly Fees and the Costs the Government Can Levy Are Limited.	44
3. Charging for a Privilege Review Is Inconsistent with the NPRA’s Purpose and Mandates.	48
4. The Legislative History Does Not Support Metro’s Interpretation of NRS 239.055.....	49
5. NRS 239.055 Does Not Apply to BWC Footage and Other Electronic Records.....	51
6. Metro Has Not Established That This Case Involves Extraordinary Use.....	54
F. THE DISTRICT COURT CORRECTLY DECIDED TO PERMIT THE REVIEW-JOURNAL AND THE MEDIA COALITION TO PAY THE PRODUCTION COSTS OVER A SIX-MONTH PERIOD RATHER THAN REQUIRING THEM TO PAY THE ESTIMATED FEE UP FRONT.....	55
G. THE DISTRICT COURT ERRED IN HOLDING THAT METRO DID NOT WAIVE ITS ABILITY TO ASSERT ANY CONFIDENTIALITY PRIVILEGES WHEN METRO FAILED TO COMPLY WITH NRS 239.0107.....	57
1. NRS 239.0107(1) Requires Strict Compliance.	58
2. The Mandatory Requirements of NRS 239.0107 Cannot Be Rendered Nugatory.....	60
H. THE PERMISSIBLE REDACTIONS OUTLINED IN THE DISCLOSURE ORDER ARE OVERBROAD AND UNCLEAR.	60

///

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT REQUIRING METRO TO PROVIDE A PRIVILEGE LOG.....	63
J. THE DISTRICT COURT ERRED IN HOLDING THAT A DISPATCH LOG IS A “GEOGRAPHIC INFORMATION SERVICE” AS DEFINED BY NRS 239.054.....	65
K. THE DISTRICT COURT ERRED IN FAILING TO CONDUCT AN EVIDENTIARY HEARING BEFORE DETERMINING WHETHER METRO WAS ENTITLED TO ANY COSTS.....	67
IX. CONCLUSION.....	67
CERTIFICATE OF COMPLIANCE.....	70
CERTIFICATE OF SERVICE	72

TABLE OF AUTHORITIES

Cases

<i>American Broadcasting Companies v. Cuomo</i> , 570 F.2d 1080 (2d Cir.1977).....	42
<i>Anthony Lee R., A Minor v. State</i> , 113 Nev. 1406, 952 P.2d 1 (1997).....	60
<i>Arizonans for Official English v. Arizona</i> , 520 U.S. 43, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997).....	24
<i>Bigpond v. State</i> , 128 Nev. 108, 270 P.3d 1244 (2012).....	34
<i>Binegar v. District Court</i> , 112 Nev. 544, 915 P.2d 889 (1996).....	25
<i>Bisch v. Las Vegas Metro. Police Dep't</i> , 129 Nev. 328, 302 P.3d 1108 (2013).....	25, 28, 29
<i>Bldg. Energetix Corp. v. EHE, LP</i> , 129 Nev. 78, 294 P.3d 1228 (2013).....	54
<i>Cameranesi v. U.S. Dep't of Defense</i> , 856 F.3d 626 (9th Cir. 2017)	64, 65
<i>Cannon v. Taylor</i> , 88 Nev. 89, 493 P.2d 1313 (1972).....	50
<i>Charlie Brown Constr. Co. v. Boulder City</i> , 106 Nev. 497, 797 P.2d 946 (1990).....	34, 35
<i>Church v. Washoe Cty.</i> , 409 P.3d 53 (Nev. 2018).....	28, 29
<i>Clark Cty. Sch. Dist. v. Las Vegas Review-Journal</i> , 134 Nev. Adv. Op. 84, 429 P.3d 313 (2018)	64

<i>Clay v. Eighth Jud. Dist. Ct.</i> , 129 Nev. 445, 305 P.3d 898 (2013)	34
<i>Comstock Residents Ass’n v. Lyon Cty. Bd. of Commissioners</i> , 134 Nev. Adv. Op. 19, 414 P.3d 318 (2018)	9
<i>Davenport v. State Farm Mut. Auto. Ins. Co.</i> , 2012 WL 555759 (M.D.Fla. Feb. 21, 2012)	62
<i>Donrey v. Bradshaw</i> , 106 Nev. 360, 798 P.2d 144 (1990)	12, 14, 16
<i>DR Partners v. Bd. of Cty. Comm’rs. of Clark Cty.</i> , 116 Nev. 616, 6 P.3d 465 (2000)	8, 36, 61
<i>Einhorn v. BAC Home Loans Servicing, LP</i> , 128 Nev. 689, 290 P.3d 249 (2012)	58, 59
<i>Falcke v. Douglas Cty.</i> , 116 Nev. 583, 3 P.3d 661 (2000)	38, 55, 56
<i>Goldman v. Bryan</i> , 106 Nev. 30, 787 P.2d 372 (1990)	50
<i>Harris Assocs. v. Clark Cty. Sch. Dist.</i> , 119 Nev. 638, 81 P.3d 532 (2003)	58
<i>Hinostroza v. Denny’s Inc.</i> , No. 2:17-cv-02561-RFB-NJK, 2018 WL 3212014 (D. Nev. June 29, 2018)	62
<i>Johnson v. PPI Tech. Servs., L.P.</i> , No. 11-2773, 2013 WL 4508128 (E.D. La. Aug. 22, 2013)	62
<i>Langston v. State, Dep’t. of Mtr. Vehicles</i> , 110 Nev. 342, 871 P.2d 362 (1994)	25, 30, 31
<i>Las Vegas Metropolitan Police Dep’t. v. Eighth Judicial Dist. Ct.</i> , 2018 WL 6264749 (Nov. 28, 2018)	22

<i>Law Offices of Barry Levinson, P.C. v. Milko</i> , 124 Nev. 355, 184 P.3d 378 (2008).....	54
<i>Leven v. Frey</i> , 123 Nev. 399, 168 P.3d 712 (2007).....	58
<i>Lewis v. Continental Bank Corp.</i> , 494 U.S. 472, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990).....	24
<i>Leyva v. Nat’l Default Servicing Corp.</i> , 127 Nev. 470, 255 P.3d 1275 (2011).....	58, 59
<i>LVMPD v. Blackjack Bonding</i> , 343 P.3d 608 (2015).....	9, 47, 48
<i>Markowitz v. Saxon Special Servicing</i> , 129 Nev. 660, 310 P.3d 569 (2013).....	58
<i>McCoy v. Providence Journal Co.</i> , 190 F.2d 760 (1st Cir. 1951).....	42
<i>McKay v. Bd. of Sup’rs of Carson City</i> , 102 Nev. 644, 730 P.2d 438 (1986).....	8, 10, 12
<i>NCAA v. University of Nevada</i> , 97 Nev. 56, 624 P.2d 10 (1981).....	24
<i>Nevada Policy Research Institute</i> , 134 Nev. Adv. Op. 81 (Oct. 18, 2018).....	8
<i>Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark</i> , 123 Nev. 44, 152 P.3d 737 (2007).....	31, 32
<i>Olech v. Vill. of Willowbrook</i> , 160 F.3d 386 (7th Cir. 1998).....	41
<i>Paramount Ins. v. Rayson & Smitley</i> , 86 Nev. 644, 472 P.2d 530 (1970).....	60

<i>Perrin v. United States</i> , 444 U.S. 37 (1979).....	54
<i>PERS v. Reno Newspapers, Inc.</i> , 129 Nev. 833, 313 P.3d 221 (2013).....	9, 62
<i>Personhood Nevada v. Bristol</i> , 126 Nev. 599, 245 P.3d 572 (2010).....	24, 29, 30
<i>Reno Newspapers v. Sheriff (Haley)</i> , 126 Nev. 211, 234 P.3d 922 (2010).....	36, 62
<i>Reno Newspapers, Inc. v. Gibbons</i> , 127 Nev. 873, 266 P.3d 623 (2011).....	passim
<i>S. Nevada Homebuilders Ass’n v. Clark Cty.</i> , 121 Nev. 446, 117 P.3d 171 (2005).....	34
<i>State Indus. Ins. System v. Bokelman</i> , 113 Nev. 1116, 946 P.2d 179 (1979).....	44, 45, 46
<i>State v. Lucero</i> , 127 Nev. 92, 249 P.3d 1226 (2011).....	9, 46
<i>Telemundo of Los Angeles v. City of Los Angeles</i> , 283 F. Supp. 2d 1095 (C.D. Cal. 2003)	42
<i>Traffic Control Servs. v. United Rentals</i> , 120 Nev. 168, 87 P.3d 1054 (2004).....	25
<i>United States v. Wells</i> , 519 U.S. 482 (1997).....	37
<i>University Sys. v. Nevadans for Sound Gov’t</i> , 120 Nev. 712, 100 P.3d 179 (2004).....	24
<i>Vill. League to Save Incline Assets, Inc. v. State ex rel. Bd. of Equalization</i> , 124 Nev. 1079, 194 P.3d 1254 (2008).....	59

<i>Vill. of Willowbrook v. Olech</i> , 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000).....	41
---	----

<i>Wedekind v. Bell</i> , 26 Nev. 395, 69 P. 612 (1902).....	24
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Statutes

NRS 239.001	passim
NRS 239.005.....	43, 45, 50
NRS 239.010	38, 60
NRS 239.0107.....	passim
NRS 239.011.....	4, 12
NRS 239.0113.....	48
NRS 239.052.....	45, 47
NRS 239.053.....	46, 52, 53
NRS 239.054.....	passim
NRS 239.055.....	passim
NRS 289.830.....	passim

Rules

Nev. R. App. P. 4 (a)(1)	1
Nev. R. App. P. 4(a)(2)	2
Nev. R. App. P. 17(a)(13).....	3
Nev. R. App. P. 17(a)(14).....	3

Nev. R. App. P. 17(b).....3

Nev. R. App. P. 3A(b)(1)1

Other Authorities

Assembly Bill 31 (2013)50

Assembly Bill 162 (2015) 35, 36, 37

Assembly Bill 214 (1997)67

Attorney General Opinion 2002-32,
2002 WL 2030953 (Aug. 27, 2002).....51

Senate Bill 123 (2007)50

I. JURISDICTIONAL STATEMENT

Nevada Rule of Appellate Procedure 3A(b)(1) allows for appeal of a final judgment of a district court. On March 2, 2018, the district court entered an order granting Respondent/Cross-Appellant the Las Vegas Review-Journal's ("Review-Journal") petition for public records pertaining to the October 1, 2017 shooting at the Route 91 Harvest Music Festival in Las Vegas, Nevada and directing Appellant/Cross-Respondent the Las Vegas Metropolitan Police Department ("Metro") to produce those records. (7AA001313-22,¹ hereinafter the "Disclosure Order.") Additionally, on March 9, 2018, the district court entered an order outlining the permissible fees Metro may charge in producing the records. (7AA1332-34; hereinafter the "Costs Order.") These orders constitute final judgments pursuant to Nev. R. App. P. 3A(b)(1).

Metro filed a timely notice of appeal on March 30, 2018.² See Nev. R. App. P. 4 (a)(1) (mandating that a notice of appeal must be filed no later than 30 days after the entry of a judgment or order). The Review-Journal filed a timely notice of cross-

¹ Citations to Appellant's Appendix ("AA") are to both volume and page number(s). Hence, "7AA001313-22" refers to volume 7 of Appellant's Appendix at pages 001313 through 001322.

² (7AA001332-34.)

appeal on April 14, 2018.³ See Nev. R. App. P. 4(a)(2) (providing that after a party files a notice of appeal, any other party may file and serve a notice of appeal within 14 days after the date when the first notice of appeal was served). Accordingly, this Court has jurisdiction over the instant cross-appeal.

II. ROUTING STATEMENT

This cross-appeal presents important questions of public policy and three substantial issues of first impression. First, this cross-appeal raises a substantial issue of first impression regarding whether the NPRA permits a governmental entity to charge requesters a fee for conducting a privilege review of public records. Second, this cross-appeal raises a substantial issue of first impression regarding whether a governmental entity waives its ability to assert claims of confidentiality apply to public records when it fails to assert those privileges in the manner required by NRS 239.0107(1). Third, the cross-appeal raises a substantial issue of first impression regarding statutory interpretation of NRS 239.054; specifically, this cross-appeal asks the Court to determine what constitutes a “geographic information system” under NRS 239.054.

Further, this case is presumptively retained by the Supreme Court because it is not a matter that would be presumptively assigned to the Court of Appeals under

³ (7AA001353-55.)

Nev. R. App. P. 17(b). Moreover, this matter is presumptively retained by the Supreme Court pursuant to Nev. R. App. P. 17(a)(13) as it raises as principal issues matters of first impression. This matter is also subject to retention by the Supreme Court pursuant to Nev. R. App. P. 17(a)(14) as this case raises as principal issues questions of statewide public importance.

III. ISSUES PRESENTED FOR REVIEW

- A. Whether Metro's appeal is moot.
- B. Whether the district court correctly required production of body-worn camera footage.
- C. Whether Metro waived its right to recover any fees for extraordinary use by failing to comply with the Disclosure Order and Costs Order and by producing responsive public records to the general public.
- D. Whether the First Amendment and Equal Protection Clause prohibit Metro from charging only the Media Litigants for access to records Metro has made available to the public.
- E. Whether the district court correctly interpreted NRS 239.055 to limit Metro's extraordinary use fees.
- F. Whether the district court correctly decided to permit the Media Litigants to pay the production costs over a six-month period rather than requiring payment of the fees up front.
- G. Whether the district court erred in holding that Metro did not waive its ability to assert any confidentiality privileges When Metro failed to comply with NRS 239.0107(1)(d).
- H. Whether the permissible redactions outlined in the March 2, 2018 Disclosure Order are overbroad and unclear.

- I. Whether the district court abused its discretion by not requiring Metro to provide a privilege log.
- J. Whether the district court erred in holding that a dispatch log is a “geographic information service” as defined by NRS 239.054.
- K. Whether the district court erred by failing to hold an evidentiary hearing before determining whether Metro was entitled to any costs.

IV. STATEMENT OF THE CASE AND SUMMARY OF THE ARGUMENT

After the tragic mass shooting at the Route 91 Harvest Music Festival, the Review-Journal and several other media entities (the “Media Coalition”) submitted requests to Metro asking for public records pertaining to Metro’s response to the shooting. Metro refused to produce any records whatsoever in response to the requests made by the members of the Media Coalition or the Review-Journal. (*See, e.g.*, 1AA000049-51).) On November 2 and November 3, 2017, after Metro refused to produce the records, the Review-Journal and the Media Coalition each filed petitions with the district court pursuant to NRS 239.011. (1AA000001-10 (Media Coalition Petition); 1AA000029-36 (Review-Journal Petition).) During litigation, Metro continued to resist disclosure on many grounds.⁴

On March 2, 2018, the district court entered and noticed an Order (the “Disclosure Order”) granting the petition. (7 AA001313-22.) In the order, the district

⁴ Metro has abandoned many of these arguments on appeal. (*Compare* Metro’s Opening Brief and Doc. No. 18-15838 (Metro’s docketing statement).)

court allowed Metro to redact certain information. The Disclosure Order also found that the NPRA required the Review-Journal and other media petitioners to pay fees associated with the production of the requested records and ordered the parties to submit supplemental briefing regarding the amount to be charged with respect to the production of the records. On March 9, 2018, without holding an evidentiary hearing, the district court entered and noticed another order (the “Costs Order”) pertinent to the records request. (7 AA1332-34.)

Metro raises three claims in its appeal: (1) that the district court erred in requiring it to produce body worn camera (“BWC”) footage rather than requiring the Review-Journal and the Media Coalition to inspect the footage, (2) that the district court erroneously limited Metro’s request to charge the Review-Journal and the Media Coalition fees for “extraordinary use” of personnel or resources pursuant to NRS 239.055, and (3) that the district court erred in allowing the Review-Journal and the Media Coalition to pay for the costs it did permit Metro to charge over a six-month period. Each of these arguments fail.

First, Metro’s decisions to (1) make the BWC footage and other records available to the general public free of charge, and (2) not provide the costs estimates required in the Costs Order, have rendered its appeal of both the Disclosure Order and the Costs Order moot. This is so because the Disclosure Order and Costs Order outlined specific steps Metro had to take in producing the records and it failed to

comply with any of those directions, and instead made them available to the public at large—including the Media Litigants—for free. Second, even if the Court determines that Metro’s entire appeal is not moot, Metro has waived its claims regarding production of BWC camera footage because it failed to comply with the Disclosure Order. Third, even if Metro’s noncompliance does not result in waiver, the district court’s order to produce the footage complies with the plain language of NRS 289.830, the purpose of NRS 289.830, and the purposes of the NPRA.

Fourth, as to its claims regarding extraordinary use, Metro has waived its right to recover any fees for extraordinary use by failing to comply with the district court’s Orders. Fifth, to the extent that Metro has not waived its right to recover extraordinary use fees, its arguments must fail because the district court correctly interpreted NRS 239.055 to limit the fees Metro attempted to extract from the Review-Journal and the Media Coalition. Sixth, the district court correctly ordered that the Review-Journal and the Media Coalition may pay any fees for extraordinary use associated with the production of the 1 October records over a six-month period.

Although the district court got many things about the NPRA right, it still got a few things wrong. On cross-appeal, the Review-Journal asserts that the district court erred by holding that Metro did not waive its ability to assert any privileges or confidentiality attached to any of the records when it failed to comply with the NPRA’s strict requirements outlining when and how a governmental entity must

respond to public records requests. The district court also erred in not requiring Metro to provide a privilege log. By Metro's own account, this case involves hundreds of public records, many of which Metro has produced in redacted form. Because Metro was not required to provide a privilege log, the Review-Journal has no way to determine if the redactions were necessary, appropriate, or comport with district court's Disclosure Order. Additionally, the Disclosure Order's permissible redactions are overbroad and unclear. The district court also erred in holding that dispatch logs are "geographic information services" as defined by the NPRA. Finally, the district court erred by not conducting an evidentiary hearing prior to allowing Metro to charge any fees for costs associated with production of the records.

V. THE NPRA MANDATES LIBERAL CONSTRUCTION

The NPRA is a comprehensive body of legislation intended to facilitate public access to governmental records. The overarching purpose of the NPRA is to "foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law." Nev. Rev. Stat. § 239.001(1). To facilitate that fundamental purpose, the NPRA must be construed liberally, government records are presumed public records subject to the act, and any limitation on the public's access to public records must be construed narrowly. Nev. Rev. Stat. § 239.001(2)-(3). As this Court has explained, "the provisions of the

NPRA ***place an unmistakable emphasis on disclosure.***” *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 882, 266 P.3d 623, 629 (2011) (emphasis added); *see also id.* 127 Nev. at 878, 266 P.3d at 626 (noting that “the provisions of the NPRA are designed to promote government transparency and accountability”).

Every provision of the NPRA “must be construed liberally” to facilitate access to public records,⁵ and any privileges and limitations on disclosure must be construed narrowly.⁶ Moreover, “[i]t is well settled that privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly.” *DR Partners v. Bd. of Cty. Comm’rs. of Clark Cty.*, 116 Nev. 616, 6 P.3d 465, 468 (2000). This is especially so in the public records context: as noted above, any restriction on disclosure “must be construed narrowly.” Nev. Rev. Stat. § 239.001(2)-(3).

Finally, if any ambiguity in any provision of the NPRA exists, it must be resolved in a manner that favors access, the unambiguous purpose of the NPRA. *Cf. McKay v. Bd. of Sup’rs of Carson City*, 102 Nev. 644, 651, 730 P.2d 438, 443 (1986) (“...a strict reading of the statute is more in keeping with the policy favoring open meetings expressed in NRS chapter 241 and the spirit of the Open Meeting Law...”).

⁵ *Gibbons*, 127 Nev. at 878, 266 P.3d at 626 (citing Nev. Rev. Stat. § 239.001(1)-(3)); *accord PERS v. Nevada Policy Research Institute*, 134 Nev. Adv. Op. 81 * 2 (Oct. 18, 2018) (citing *Gibbons*, 127 Nev. at 878, 266 P.3d at 626).

⁶ Nev. Rev. Stat. § 239.001(3).

Consistent with these mandates, “public record” must be interpreted broadly, not narrowly as Metro suggests. In its Opening Brief, Metro asserts that the NPRA does not define “public record.” (OB, p. 18.) This assertion ignores that this Court has defined what constitutes a “public record” for the purposes of the NPRA. In *LVMPD v. Blackjack Bonding*, 343 P.3d 608, 613 (2015), this Court explained that “public record” is any governmental record which relates to the “provision of a public service.” *Accord Comstock Residents Ass’n v. Lyon Cty. Bd. of Commissioners*, 134 Nev. Adv. Op. 19, 414 P.3d 318, 321 (2018).

VI. STANDARDS OF REVIEW

As Metro notes in its Opening Brief (OB, p. 7), the Court reviews a district court’s decision to grant a petition for a writ of mandamus under an abuse of discretion standard, and reviews questions of statutory construction *de novo*. *PERS v. Reno Newspapers, Inc.*, 129 Nev. 833, 836, 313 P.3d 221, 223 (2013).

Metro ignores the plain text of the NPRA and imagines exceptions in the NPRA that do not exist. In its Standards of Review section (OB, pp. 7-8), Metro lays the groundwork for this argument by asserting that where “a matter is addressed with ‘imperfect clarity,’” this Court can discern the law. (OB, p. 7.) This ignores that Metro must first establish an actual ambiguity,⁷ and that any ambiguity must be

⁷ See, e.g., *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) (“To interpret an **ambiguous statute**, we look to the legislative history and construe the

resolved in a manner that furthers the NPRA’s goal—access to public records. While Metro relies on matters such as inferences regarding the intent behind a statute separate from the NPRA, the allowance of a balancing test into NPRA analysis does not open the door to such arguments. Instead, this case must be resolved pursuant to the NPRA’s mandates set forth below. Even if any ambiguity exists, it must be resolved in a manner that favors access, the unambiguous purpose of the NPRA. *Cf. McKay v. Bd. of Sup’rs of Carson City*, 102 Nev. 644, 651, 730 P.2d 438, 443 (1986)(“...a strict reading of the statute is more in keeping with the policy favoring open meetings expressed in NRS chapter 241 and the spirit of the Open Meeting Law...”).

VII. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

A. THE RECORDS REQUESTS

1. October 2, 2017 Requests

In addition to the requests made by the members of the Media Coalition which are detailed in the Media Coalition’s Answering Brief (*see* Doc. No. 18-906262, p. 1; *see also* 1AA000066-216), the Review-Journal made a number of public records requests designed to answer important questions about the horrific events of 1 October. Starting on October 2, 2017, hours after the 1 October shooting, the

statute in a manner that is consistent with reason and public policy.”) (emphasis added; citations omitted).

Review-Journal submitted a series of requests to Metro for the following public records:

- A log and/or call slips of any and all emergency calls received on Sunday October 1 between 8 p.m. and 2 a.m. regarding calls for service between the 3800 and 4000 blocks of South Las Vegas Blvd, including but not limited to time stamps, origin/location and address of the originating call, reason for the call, police patrol units dispatched including the patrol unit numbers, patrol unit substation and time of dispatch and time of arrival; and
- A log and/or call slips of any and all emergency calls received on Sunday October 1 between 8 p.m. and 2 a.m. regarding calls for service between the 3800 and 4000 blocks of South Las Vegas Blvd, including but not limited to time stamps, origin/location and address of the originating call, reason for the call, fire and ambulance units dispatched including, unit numbers and time of dispatch and time of arrival.

(1AA000038-41.) Later that same day, the Review-Journal sent another records request to Metro asking for recordings of 911 calls for service received on October 1, 2017 between 8:00 p.m. and 2:00 a.m. between the 3800 and 4000 blocks of South Las Vegas Blvd, the area where the 1 October shooting took place. (1AA000043-44.) Also on October 2, 2017, the Review-Journal sent a separate request for any and all 911 calls relating to the shooting at the Route 91 Harvest Music Festival. (1AA000046.)

On October 9, 2017, after receiving no response to its October 2, 2017 records requests, the Review-Journal contacted Metro for an update. (1AA000048.) Metro did not respond to the Review-Journal's records requests until October 18, 2017—

twelve business days after receiving the October 2, 2017 requests. (1AA000050.) In its response, Metro refused to provide any of the records in the Review-Journal's request, claiming that because the records are purportedly "part of an open investigation" they were "confidential and privileged pending the outcome of the investigation." (*Id.*) Metro cited this Court's opinion in *Donrey v. Bradshaw*, 106 Nev. 360, 798 P.2d 144 (1990) as the sole basis for its refusal. (*Id.*)

2. October 15, 2017 Request

On October 15, 2017, the Review-Journal sent Metro another request for records related to the 1 October shooting, this time requesting Metro provide "[p]urchase orders for any emergency purchases on or after Oct. 1, 2017;" and "[c]opies of any emergency, no-bid contracts entered on or after Oct. 1, 2017." (1AA000053-55.) Metro did not respond to this request.

B. THE LITIGATION IN DISTRICT COURT

On November 3, 2017, the Review-Journal filed a Petition for Writ of Mandamus pursuant to Nev. Rev. Stat. § 239.011 (1AA000029-36). The Review-Journal then moved on November 7, 2017 to consolidate its petition with the petition filed by the Media Coalition. (See 7AA001389 (register of actions); see also 1AA000001-10 (Media Coalition's petition).). On November 30, 2017, the Review-Journal filed an Amended Petition. (1AA000088-99.)

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The Review-Journal filed an opening brief in support of its Amended Petition on December 8, 2017. (1AA000127-47.) In that brief, the Review-Journal specifically requested the district court order Metro to “produce a log identifying the documents being withheld and setting forth the specific bases for withholding” each document. (1AA000143.) The Review-Journal also asked the district court to find that, by failing to respond to its October 2, 2017 and October 15, 2017 requests in the time and manner required by NRS 239.0107, Metro had waived its right to assert that privilege attached to any of the requested documents based on a statute or other legal authority. (1AA000136-38.)

C. THE DISTRICT COURT’S ORDERS

1. The Disclosure Order

The district court conducted a hearing on the Review-Journal and Media Coalition’s petitions on February 7, 2018. (5AA000866-925 (transcript of hearing).) At the hearing, the district court stated that it would grant the Review-Journal’s and Media Coalition’s (collectively, the “Media Litigants”) petitions. (See 5AA000902-08.) On March 2, 2018, the Court entered the Disclosure Order granting the Media Litigants’ petitions in their entirety and ordering supplemental briefing from the parties regarding what fees the NPRA permits Metro to charge for production of the requested records. (7AA001313-22.) The Disclosure Order imposed the following obligations regarding production and compliance:

- Metro must “immediately begin producing public records” on a “rolling basis” as soon as they are ready for disclosure “without unnecessary delay” (7AA001320);
- Metro “shall exercise the utmost good faith in producing the public records on a timely basis” (*id.*);
- Metro “shall make any and all public records subject to this proceeding available at Metro’s office for review by the Media Litigants, particularly where production of those public records is either too burdensome or impossible otherwise” (*id.*);
- Metro and the Media Litigants must “meet and confer” to resolve issues with public records “that may be highly confidential” or difficult to redact (*id.*);
- A status check was set for March 7 for the parties to discuss what “has and has not been produced” (*id.*), to give the parties “an opportunity to explain whether there has been good faith communication regarding the production” (7AA001321), and to allow the Court to “hear any objections with respect to the delay in disclosure or the need for more time” (*id.*); and,
- The parties must produce a status report “covering what has and has not been produced” pursuant to the Disclosure Order within 30 days (7AA001320.)

The Disclosure Order further provided that if Metro “comes across any individual public record that may be highly confidential or where redactions may not be practicable,” Metro could meet and confer with the Media Litigants to resolve the issue or seek a protective order. (*Id.*)

The Disclosure Order did not, however, direct Metro to provide the Review-Journal with a privilege log as the Review-Journal had requested. The Disclosure

Order also denied the Review-Journal's request to find that Metro had waived its right to assert any privileges made the requested records confidential by failing to respond in the manner required by NRS 239.0107. Although the district court acknowledged that Metro had failed to timely respond to the Media Litigants' records requests, it held that Metro's delay was excusable because of the "extraordinary circumstances" surrounding the 1 October shooting. (7AA001318.)

2. The Costs Order

On March 7, 2018, the district court conducted a status check and heard argument from the parties regarding the fees and costs Metro could charge the Media Litigants under the NPRA. (7AA001356-88.) At that hearing, the district court directed Metro to meet and confer with the Media Litigants to identify the scope of materials that would be responsive to the record requests, and to consider if there were initial documents that Metro could produce. (7AA001385.)

Although the district court had indicated an evidentiary hearing might be necessary (7AA001385), on March 9, 2018, the district court entered and noticed another order pertinent to the records request, the Costs Order. (7AA001323-31.) The Costs Order partially denied Metro's request to charge fees for the production of some records but permitted Metro to charge certain fees for the production of certain responsive public records. The district court summarized the permissible costs Metro could charge the Media Litigants as follows:

Evidence Logs, and Interview Reports: COPY COSTS of 31 cents per page, plus an additional 50 cents for extraordinary services, for a total of 81 cents.

Body Cams, and 911 Calls: COPY COSTS - meaning only the actual costs to reproduce the records onto the medium for transfer, and the cost of such medium (such as DVD, CD, flash drive, hard drive, etc.).

Dispatch Logs: PRE-COPY PREPARATIONS, meaning actual cost to gather, discuss, supervise and insure quality control, as part of the effort to comply with the [Media Litigants'] request.

(7AA001330.) The district court also specifically required Metro to begin its production of records to the Media Litigants within three business days from the date of the Costs Order and ordered Metro to do so on a rolling basis as the records became available. (*Id.*) The district court also required Metro to provide the Media Litigants with an estimate of the allowable fees outlined in the Costs Order within three business days from the date of the Order. (*Id.*) As of the date of this filing, Metro has not complied with this provision of the Costs Order.

Metro filed a timely notice of appeal from both the Disclosure Order and Costs Order on March 30, 2018. (7AA001332-34.) Metro also filed a motion for a stay pending appeal on April 3, 2018, and the district court entered an order on April 13, 2018 denying that motion. (7AA001391.) Metro then moved this Court for a stay pending appeal. *See* Doc. No. 18-15220. On April 27, 2018, this Court entered an order denying Metro's motion for a stay. *See* Doc. No. 18-16064.

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D. THE MEDIA LITIGANTS' EFFORTS TO NARROW REQUESTS AND REDUCE COSTS

At the February 7, 2018 hearing in which the Court granted the petitions, the Court ordered Metro to work with Petitioners in producing the records on a rolling basis. (1RA023-25 (directing the parties to “meet and confer” in the event of any issues with “highly confidential” records and to “exercise utmost good faith in producing the documents in good faith”).) Weeks after the hearing, and before the entry of the Disclosure Order, counsel for the Review-Journal emailed counsel for Metro to inquire about her review of the proposed Disclosure Order and to request information about Metro’s plan to comply with the Court’s order. (1RA31-33.) While counsel for Metro did provide information about the status of the proposed order, she did not provide any information about Metro’s intent to comply with the order. (1RA031.)

The district court’s entry of both the Disclosure Order and the Costs Order did not improve Metro’s compliance. Metro ignored its obligations to coordinate with Petitioners and start producing records “immediately” pursuant to the March 2, 2018 Disclosure Order or within three (3) business days of the March 9, 2018 Costs Order. On March 13, 2018, counsel for the Media Litigants met and conferred with counsel for Metro to discuss record production. (1RA035 (letter summarizing meet and confer discussion).) During that phone call, counsel for the Media Litigants offered to work on a list to assist Metro “in prioritizing which Body Worn Camera (“BWC”)

footage to examine first for the purposes of producing it to Petitioners in this action.” (*Id.*) In a March 14, 2018 letter summarizing the telephone conference (*id.*), counsel for the Other Petitioners emphasized that the costs and workload for all the parties could be reduced if Metro provided more information and detail about records that are responsive to the Petitioners’ records requests. (*Id.*)

Metro never responded to that letter. It also did not produce records or seek a stay by the deadline set by the Costs Order, which was March 14, 2018—three business days after the entry of the Costs Order. (*See* 7AA001330 (ordering Metro to begin producing records within three business days from the entry of the Order).) Metro also failed to provide the Media Litigants with an estimate of the fees it would charge for the production of the records as directed by the Costs Order. (*See id.*)

Undeterred by Metro’s intransigence, counsel for the Media Litigants continued to reach out to Metro to offer to work with the department to sequence production and potentially narrow requests; indeed, in an April 23, 2018 letter to Metro, counsel for the Review-Journal even stated that the paper would be amenable to in-person inspection of the BWC footage. (1RA040 (“The Review-Journal seeks to either review the footage in person . . . or receive copies . . . whichever is most efficient and will enable review as quickly as possible”).)

After this Court entered its April 27 Order denying Metro’s motion for a stay, counsel for the Media Litigants once again offered to work with Metro to streamline

the records requests. Notably, in response to inquiries from counsel for the Review-Journal regarding the pending release of the first batch of 1 October records, counsel for Metro advised the Review-Journal via email that the paper would only be responsible for the costs of the records Metro produced to it. (1RA065 (“You will still be responsible for costs associated with documents produced to you.”); (“As a reminder, you will only be charged for the records you receive.”).) But, as discussed below, Metro never actually produced the records to the Review-Journal, instead opting to make the records generally available to any member of the media.

E. METRO’S GENERAL RELEASES OF RECORDS

On May 1, 2018, after this Court denied Metro’s request for a stay, Metro held a press conference announcing that it would make the BWC footage of two entry team officers available to any media entity on May 2, 2018. (1RA088-90.) During the press conference, Metro Sheriff Joe Lombardo noted that producing the public records requested by the Media Litigants would be expensive and time consuming. (1RA089.) However, the costs Sheriff Lombardo complained of are a self-created burden. As discussed above, the Media Litigants tried repeatedly to work with Metro to limit the scope of production and thereby reduce costs for all parties. Rather than working with the Media Litigants to facilitate access to the requested records as directed by the district court, Metro simply refused to communicate regarding what records were in its possession or the timing for releasing those records.

On May 2, 2018, Metro began the first in a series of releases of 1 October records to the general public.⁸ The first release included BWC footage from the officers who entered the hotel room of 1 October shooter Stephen Paddock.⁹ As discussed in the Media Coalition's Answering Brief, Metro produced this first batch of records to the Media Litigants. (Doc. No. 18- 906262, p. 4.)

After the close of business on May 15, 2018, Metro's Public Information Office sent out an email blast (presumably to everyone on its automated press email list). (1RA162-63.) The email stated that any member of the media could go to Metro's headquarters and obtain DVDs of certain records at issue after 12:00 p.m. on May 23, 2018. (1RA163.) After happening to learn of the email blast, counsel for the Review-Journal emailed counsel for Metro to express her concerns about the lack of notice to the Media Litigants' counsel, and the fact that Metro was making the records generally available to the media and not directly to the Media Litigants. (1RA165.)

Later, on May 22, 2018, Metro circulated a press release announcing that starting on May 23, 2018, Metro would begin making records related to the 1 October shooting generally available for pickup by any media entity and outlined

⁸ See <https://www.reviewjournal.com/crime/shootings/las-vegas-police-enter-guest-room-during-oct-1-shooting-video/> (last accessed December 5, 2018).

⁹ *Id.*

the procedure it would employ for subsequent productions. (See Media Coalition's Respondent's Appendix at 1RA024-25; *see also* Doc. No. 18-906262 at pp. 4-5 (discussing same).)

Since the May 23, 2018 general release of records, Metro has made new batches of records available to the general media on a weekly basis; as of the date of this filing, Metro has made over two dozen releases of public records related to the shooting.¹⁰ With each release of records, Metro has unilaterally decided to make the records generally available to the public and has never met and conferred with the Review-Journal and the Media Coalition as it was ordered to do. (See 7AA001320.) Additionally, although Metro asserts that production of the BWC footage from the 1 October shooting is "not practicable" (OB, p. 20), many of these productions have included BWC footage.¹¹

¹⁰ See, e.g., <https://www.reviewjournal.com/crime/shootings/new-video-shows-panicked-concertgoers-fleeing-las-vegas-shooting-1517442/> (November 2, 2018 Review-Journal article noting that as of November 2, 2018, Metro had made 26 releases of public records related to the 1 October shooting; last accessed December 5, 2018).

¹¹ See, e.g., <https://www.reviewjournal.com/videos/officers-inside-stephen-paddocks-room-after-the-breach/> (September 5, 2018 release of BWC footage); <https://www.reviewjournal.com/crime/shootings/videos-show-police-searching-for-las-vegas-shooting-survivors/> (October 2, 2018 release of BWC footage); <https://www.reviewjournal.com/crime/shootings/las-vegas-shooting-survivors-break-into-applause-for-officers-video/> (October 17, 2018 release of BWC footage); <https://www.reviewjournal.com/crime/shootings/police-release-more-las-vegas-shooting-records-as-deadline-approaches/> (October 10, 2018 release of BWC

F. FURTHER LITIGATION REGARDING COMPLIANCE

After the district court entered the Disclosure Order and the Costs Order, the Review-Journal filed a motion to address issues concerning Metro's non-compliance with the Orders. After the district court granted that motion in part on June 11, 2018 (the "Compliance Order"), Metro filed an emergency petition challenging the jurisdiction of the district court to enter that order (the "Emergency Petition"). This Court entered an order on November 28, 2018 denying in large part the Emergency Petition. In significant part Metro had challenged—but this Court upheld—the portions of the Compliance Order that "require[d] Metro to produce 'any existing' lists or 'already-existing documentation' regarding ...categories of information not already produced and that were within Metro's possession, custody, or control." *Las Vegas Metropolitan Police Dep't. v. Eighth Judicial Dist. Ct.*, 2018 WL 6264749 at *5 (Nov. 28, 2018).

As explained in the Review-Journal's June 19, 2018 Response in Opposition to the Emergency Petition (the "Response," Case No. 75518, Doc. No. 18-23273, pp. 3-4), the lists and other documentation reflecting which responsive records existed could have been utilized by the Petitioners to narrow requests. Instead of

footage); <https://www.reviewjournal.com/crime/shootings/latest-las-vegas-shooting-footage-shows-security-control-room/> (October 3, 2018 release of BWC footage) (all links last accessed on December 5, 2018).

cooperating, Metro resisted producing even existing lists and took the absurd position that it had to produce each and every responsive record. It also refused to provide the records to directly to the Media Litigants as ordered, instead making the records generally available to the public.

VIII. LEGAL ARGUMENT

A. METRO'S APPEAL IS MOOT.

The Disclosure Order requires Metro to produce public records concerning 1 October *to the media outlets* who petitioned the district court for relief. The Costs Order mandates that Metro *first provide a cost estimate to Petitioners in advance* of each of the six (6) months the district court planned for production and that Metro was then to collect costs in advance. Metro filed a notice of appeal and then unsuccessfully sought a stay of enforcement of the orders. Despite this lack of a stay, Metro failed to comply with either order, which renders its appeal moot.

In its Emergency Motion for a Stay, Metro stated that it would be raising two “significant legal issues” on appeal: (1) whether Metro’s interest in its investigative techniques, tactics, procedures and other confidential information outweigh the public’s interest in disclosure (and therefore would require inspection rather than production of the BWC footage); and (2) if Metro was nonetheless required to produce records, whether it was permitted to charge for staff time for the production of public records involving extraordinary use of personnel. (Emergency Motion for

Stay, Doc. No. 18-15220, p. 9.) While Metro’s appeal could have remained justiciable despite the denial of the stay (as the Review-Journal contended in its opposition to the Motion to Stay, *see* Doc. No. 18-15680, pp. 14-15), Metro’s decisions to (1) make the BWC footage and other records available to the general public free of charge, and (2) not provide the costs estimates required by the Costs Order, have rendered its appeal of both the Disclosure Order and the Costs Order moot. Therefore, Metro’s appeal must be dismissed for mootness.

1. Legal Standard for Dismissal of Appeals for Mootness.

This Court has made clear that it can only consider live, actual controversies.

As it explained when dismissing one matter as moot:

The question of mootness is one of justiciability. This court’s duty is not to render advisory opinions but, rather, to resolve actual controversies by an enforceable judgment. *NCAA v. University of Nevada*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981). Thus, a controversy must be present through all stages of the proceeding, *see Arizonans for Official English v. Arizona*, 520 U.S. 43, 67, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997); *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 476–78, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990), and even though a case may present a live controversy at its beginning, subsequent events may render the case moot. *University Sys. v. Nevadans for Sound Gov’t*, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004); *Wedekind v. Bell*, 26 Nev. 395, 413–15, 69 P. 612, 613–14 (1902).

Personhood Nevada v. Bristol, 126 Nev. 599, 602–03, 245 P.3d 572, 574 (2010). In this case, the appeal became moot when Metro decided to produce the records to the general public and decided not to provide the costs estimates required in the Costs

Order.

The Review-Journal recognizes that “[e]ven when an appeal is moot” this Court may “consider it if it involves a matter of widespread importance that is capable of repetition, yet evading review.” *Traffic Control Servs. v. United Rentals*, 120 Nev. 168, 171–72, 87 P.3d 1054, 1057 (2004) (recognizing that the capable-of-repetition-yet-evading-review exception to the mootness doctrine applies when the duration of the challenged action is “relatively short” and there is a “likelihood that a similar issue will arise in the future” (citing *Binegar v. District Court*, 112 Nev. 544, 548, 915 P.2d 889, 892 (1996) (noting that the matter must be important), and *Langston*, 110 Nev. at 344, 871 P.2d at 363 (pointing out that facts unique to a particular party will not give rise to the mootness exception))). Metro has the burden of meeting this exception to the mootness doctrine. *Bisch v. Las Vegas Metro. Police Dep’t*, 129 Nev. 328, 334-35, 302 P.3d 1108, 1113 (2013) (providing the elements for the exception to the mootness doctrine and placing the burden on the party seeking to invoke the exception).

2. Metro’s Claims Regarding BWC Footage Are Moot.

Metro failed to produce the records directly to Petitioners or communicate with their counsel about productions.¹² Instead, after months of resisting production

¹² Metro’s failure to communicate with the Media Litigants regarding production is discussed in detail in the Review-Journal’s Response to Metro’s Emergency Petition for Writ of Prohibition in Nev. S. Ct. Case No. 76023, Doc. No.

to the Media Litigants, after the Media Litigants obtained two court orders granting them access to public records regarding 1 October, and despite the pendency of this appeal, Metro suddenly changed gears: it decided to make records generally available to any media entity who wants them, for free. To obtain access from Metro now, a media outlet need not even make a formal NPRA request or pay anything to Metro, let alone litigate. Now, due to Metro's general releases of records, all a media entity needs to do is physically show up at Metro's headquarters (and, with regard to the more recent productions, provide storage media such as flash drives in advance).¹³

As discussed above, Metro has released several batches of BWC footage; therefore, the question of whether BWC footage must be inspected instead of produced if it contains confidential information is moot. Even if this Court were to entertain the now-hypothetical question of whether Metro's investigative techniques and other confidential information contained in the BWC footage outweigh the public's interest in BWC footage and answer it in the affirmative, Metro could not

18-23273, pp. 7-14.

¹³ Metro's counsel has not provided counsel for the Media Litigants with any advance notice of any productions. Thus, when the Media Litigants have obtained records, it is just via happenstance and due to their own efforts to follow up and elbow their way into line for records every Wednesday.

gain meaningful relief. Whatever purportedly confidential information is contained on the BWC footage is now in the public domain by virtue of Metro releasing the BWC footage to the public at large.¹⁴ Because Metro cannot “un-produce” these records, Metro has necessarily mooted any consideration of whether BWC footage should be subject to inspection rather than production.

3. Metro’s Claims Regarding Extraordinary Use Fees Are Moot.

Metro’s claim regarding costs is moot because it has never produced records to Petitioners or provided the Media Litigants with cost estimates as mandated by the Costs Order, which predicates any collection of costs on providing an estimate of costs to petitioners in advance of production. (7AA001330.) Metro did not appeal this cost estimate requirement of the Costs Order—instead, Metro ignored it. Thus, even if this Court were to entertain the now-hypothetical question of whether Metro is entitled to extraordinary use fees and answer it in the affirmative, Metro would not be entitled to such fees by virtue of their non-compliance with the plain terms of the Costs Order, which mandates submission of cost estimates before production. Thus, this issue is moot.

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¹⁴ Indeed, perhaps recognizing that its own actions have mooted this claim, Metro does not even raise it on appeal, arguing instead that the district court should have ordered that the BWC footage be made available for inspection only. (OB, pp. 19-23.)

Other than the positions it has taken in this litigation, Metro is not requiring that any media entity pay to receive electronic copies of the documents it is making generally available. Accordingly, because Metro has only sought extraordinary use fees from the parties to this litigation, Metro has waived any claim to extraordinary use fees. Metro has also taken the position that it need not and should not provide Petitioners with information they could use to limit costs and unnecessary productions (*see generally*, Emergency Petition for Writ of Prohibition in Nev. S. Ct. Case No. 76023, Doc. No. 18-21634). Metro has also determined that it should just unilaterally produce all the records to the public at large. Accordingly, because Metro’s failure to meet and confer in good faith with Petitioners brought about the “extraordinary use” for which it hopes to recover fees, Metro’s appeal of the Costs Order is moot.

4. The Issues Metro Appeals Are Not Capable of Repetition, Yet Evading Review.

The proponent of the “capable of repetition, yet evading review” mootness exception “must demonstrate that (1) the duration of the challenged action is relatively short, (2) there is a likelihood that a similar issue will arise in the future, and (3) the matter is important.” *Church v. Washoe Cty.*, 409 P.3d 53 (Nev. 2018) (*quoting Bisch v. Las Vegas Metro. Police Dep’t*, 129 Nev. 328, 334–35, 302 P.3d 1108, 1113 (2013)). Metro cannot meet this burden.

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For example, this Court has declined to apply this exception to the mootness doctrine when the issue has been mooted by the appellant's own actions, as is the case here. For example, in *Church*, this Court held that the appellant's "delay in requesting the district court to expedite the hearing on his challenge, and his failure to seek appellate review until after the 2016 election concluded [showed that appellant failed] to demonstrate that his challenge ... could not have been resolved before it became moot." *Church*, 498 P.3d at 53. Similarly, Metro cannot show that it could not have gotten resolution of this issue before the district court compelled it to begin producing documents. As the district court noted, Metro engaged in extensive "gamesmanship" and repeatedly switched tactics to avoid production.¹⁵ This delay, combined with filing a spurious Motion for Reconsideration only to drop it in favor of filing an appeal, have turned this issue from a "relatively short" one into one that has dragged on and on, past the point where Metro can obtain any meaningful relief.

In *Personhood Nevada*, this Court dismissed an appeal by the proponents of an initiative petition that had been enjoined by the district court because the proponents failed to obtain sufficient signatures to place the petition on the ballot before the election came and went. Thus, even though elections and petition drives

¹⁵ (See Ex. I (4/10 Hrng. Tr.) to the Review-Journal's Opposition to Metro's Emergency Motion for Stay Pending Appeal, pp. 16:16-17; p. 20:7-12.)

are regular, repeated events, this Court found that, even if it overturned the district court's decision, it was "unable to grant effective relief with respect to the district court injunction at issue, and this appeal is moot." *Personhood Nevada v. Bristol*, 126 Nev. 599, 602–03, 245 P.3d 572, 574 (2010). (citing *Langston v. State, Dep't. of Mtr. Vehicles*, 110 Nev. 342, 344, 871 P.2d 362, 364 (1994).) Consequently, even though it is expected that Metro may attempt to resist public records requests in the future, their appeal is still moot.

B. THE DISTRICT COURT CORRECTLY REQUIRED PRODUCTION OF BODY WORN CAMERA FOOTAGE.

1. Metro Waived Its Claims Regarding Production of Body Worn Camera Footage by Failing to Comply With the Disclosure Order.

Metro argues in its Opening Brief that the district court improperly ordered it to produce BWC footage from the 1 October shooting because the court "ignored" the time and costs Metro would incur in redacting confidential information (OB, p. 3; *see also id.* at p. 22), and further asserts that the plain language of NRS 289.830 requires inspection rather than redaction. (OB, p. 3; *see also id.* at pp. 22-23.) These claims, however, are not appropriate for this Court's review because Metro has failed to exhaust the judicial remedy the district court included in the Disclosure Order to address claims regarding the alleged impracticability of redacting the BWC

footage.¹⁶

As discussed above, the Disclosure Order provides Metro with a specific remedy to address issues with redaction: specifically, the district court ordered that “if Metro comes across any individual public record that may be highly confidential or where redactions may not be practicable, Metro shall meet and confer with [the Media Litigants] in an attempt to resolve the issue.” (7AA001320.) Further, the district court provided that Metro may seek a protective order if the meet and confer efforts did not resolve the issue. (*Id.*) Thus, the Disclosure Order provides a specific remedy to address Metro’s complaints regarding the alleged burdens and confidentiality concerns associated with producing the redacted BWC footage.

Metro, however, has never availed itself of this specific remedy. Accordingly, it has waived these claims. “Waiver requires the intentional relinquishment of a known right.” *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007) (citation omitted). “[W]aiver of a right may be inferred when a party engages in conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been

¹⁶ Moreover, Metro’s accusation that the district court “ignored” the costs and time associated with producing the records is inaccurate. In its Costs Order, the district court specifically recognized that production of the records would require Metro to incur costs but noted that “the responsibility of this Court is to only apply the law as given to the facts at hand, leaving it to others to determine whether the law should be changed.” (7AA001323-24.)

relinquished.” *Id.* (citation omitted).

Here, the Disclosure Order provided Metro with a specific remedy to address the precise concerns it raises regarding the production of the BWC footage: it could meet and confer with the Media Litigants to attempt to reach a solution if any particular record proved too difficult to redact or contained confidential information, then if Metro and the Media Litigants could not reach an agreement to resolve any such issues, Metro could have moved the district court for a protective order.

Indeed, as noted by counsel for the Review-Journal at the March 7, 2018 status hearing, counsel for the Review-Journal and the Media Coalition made multiple efforts to meet and confer with Metro to limit the scope of production (and thus reduce the burden on Metro in production). (7AA001373;¹⁷ 7AA001379-80.)

Counsel for the Review-Journal also requested Metro make the requested records—including the BWC footage—available for inspection to reduce costs for

¹⁷ (“We would have been happy to sit down with Metro to talk about what body cam footage exists and ways to make this less burdensome, ways in which we can prioritize what we want first. But Metro, I think in violation of the Court’s order, has not responded to my suggestion, my questions about what their plans are regarding compliance.”)

all the parties. (7AA001383-84¹⁸.) Counsel for the Review-Journal also suggested that Metro's concerns about the costs of production could be alleviated if Metro provided the Media Litigants with an inventory of potentially responsive records so that the Media Litigants could narrow their requests. (7AA001384.)

But Metro opted not to meet and confer with the Media Litigants or request a protective order. Instead, as discussed above, it began producing the BWC footage in serial productions to any members of the media who wanted a copy. Thus, it has waived the claim that BWC footage must be inspected, not produced.¹⁹

2. The Plain Language of NRS 289.830 Permitted the District Court to Order Metro to Produce the BWC Footage.

Even if Metro has not waived its claims regarding the ordered production of the BWC footage, its claims still fail. Although Metro asserts that the district court's Disclosure Order contravenes the plain language of NRS 289.830, it never actually addresses that plain language in its Opening Brief. Instead, Metro dives directly into

¹⁸ (“And what I would ask is that Metro make certain records available for inspection upon request by petitioners. We’re not intending to request, you know, all of the body cam footage all at once or anything like that but what I would request is that Metro make some of the documents, for example such as some of the contracts that the Review Journal asked for and other materials maybe finite requests for body cam footage, that they consider those requests and cooperate with inspection requests which may obviate the need for cost on both sides.”)

¹⁹ Additionally, Metro has never provided evidence of the actual costs associated with redaction, instead only providing a self-serving declaration about the estimated time and money it would take to review and redact the BWC footage. (See 7AA001306-1309; *see also* OB, pp. 13-15.)

the legislative history of the statute and engages in unsupported speculation about the legislature's intent in amending the statute in 2015. (OB, pp. 19-21.) When interpreting a statutory provision, however, this Court "looks first to the plain language of the statute." *Clay v. Eighth Jud. Dist. Ct.*, 129 Nev. 445, 451, 305 P.3d 898, 902 (2013) (citing *Bigpond v. State*, 128 Nev. 108, 114, 270 P.3d 1244, 1248 (2012)). The Court must give the terms "their plain meaning, considering its provisions as a whole so as to read them 'in a way that would not render words or phrases superfluous or make a provision nugatory.'" *S. Nevada Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (quoting *Charlie Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 502, 797 P.2d 946, 949 (1990)).

Accordingly, the starting point for this Court's analysis must be the plain language of NRS 289.830(2), the provision which Metro alleges requires inspection rather than production. That section provides as follows:

Any record made by a portable event recording device pursuant to this section is a public record which may be:

(a) Requested only on a per incident basis; and

(b) Available for inspection only at the location where the record is held if the record contains confidential information that may not otherwise be redacted.

NRS 289.830(2).

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Pursuant to this plain language, inspection of BWC footage is necessary only when the record “contains confidential information that may not otherwise be redacted.” By Metro’s own admission, redaction of the BWC footage at issue in this case is indeed possible. (See OB, p. 21.) And, as noted above, Metro’s multiple productions of BWC footage demonstrates that production of the BWC footage with the redactions permitted under the Disclosure Order can be accomplished. Thus, under the plain language of NRS 289.830, the district court properly ordered Metro to produce the requested BWC footage.

3. The District Court’s Order Comports With the Purpose of NRS 289.830.

Given the plain language of NRS 289.830 and Metro’s admission that redaction is possible, Metro’s claim of error is void *ab initio*. Absent some showing that the BWC footage “may not otherwise be redacted,” the district court’s order comports with the plain language of NRS 289.830. Not content with this result, however, Metro attempts to distract the Court’s attention by discussing a select portion of the legislative history of Assembly Bill 162 (“AB 162”), a 2015 bill which revised provisions of NRS 289.830. (See OB, pp. 19-21.) Specifically, Metro focuses solely on the testimony of Chuck Callaway, Metro’s Director of the Office of Intergovernmental Services. (see *id.*) As described by Metro, Mr. Callaway’s testimony regarding redacting consisted primarily of spinning out scenarios in which information might not be amenable to redaction. (OB, pp. 20-21 (summarizing

testimony).)

Those speculative scenarios, however, are not at issue in this case. What is at issue is whether the information the district court permitted Metro to redact from the BWC footage is amenable to redaction. And, as discussed above, Metro has acknowledged and demonstrated that it is. Indeed, Metro has already made the footage available to the entire general public.

Moreover, speculation cannot be used as a basis for withholding the BWC footage. As this Court has repeatedly explained, in meeting its burden of demonstrating that some interest in confidentiality outweighs the public's interest in access to governmental records, the governmental entity seeking to withhold records may not meet its burden under the NPRA "with a non-particularized showing, or by expressing hypothetical concerns." *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011) (citing *Reno Newspapers v. Sheriff (Haley)*, 126 Nev. 211, 218, 234 P.3d 922, 927 (2010) and *DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 628, 6 P.3d 465, 473 (2000)).

Even if the Court were to look to the legislative history in deciding this claim, Metro's request for inspection instead of production does not comport with the Legislature's purpose in adopting AB 162—promoting transparency. As stated by Assemblyman Harvey J. Munford, the sponsor of AB 162, the purpose of the bill was to provide the public with "visual evidence [that] will allow for clear pictures

of what happened on those occasions when a dispute arises and the facts are sometimes cloudy and not totally transparent.” Hearing on AB 162 Before the Assembly Committee on Government Affairs, 78 Leg., p. 3 (Nev. Mar. 9, 2015).

Given the unprecedented nature of the 1 October shooting, the number of victims, the number of law enforcement officers who responded to the incident, and the size and complexity of the crime scene, the public had (and continues to have) a vital interest in understanding how law enforcement responded during and in the immediate aftermath of the shooting. Thus, the district court’s order directing Metro to produce the BWC footage with limited redactions comports with the intent of AB 162.

Metro also engages in rank speculation about the Legislature’s intent in adopting AB 162. According to Metro, the Legislature “must have intended there be a distinction between when redaction is simple and possible versus when redactions are complex and burdensome.” (OB, p. 21.) Of course, Metro cites to no portion of the legislative record to support this supposition. Absent evidence in the legislative history that the Legislature in fact intended to make this distinction, this Court should decline Metro’s invitation to read such a distinction into the law. *See United States v. Wells*, 519 U.S. 482, 496 (1997) (noting that “we have frequently cautioned that it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law”) (internal quotations and punctuation omitted); *see also*

Falcke v. Douglas Cty., 116 Nev. 583, 589, 3 P.3d 661, 665 (2000) (holding that “it is not the business of this court to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done”) (quotation omitted).

4. The District Court’s Order to Redact BWC Footage Comports With the NPRA.

The NPRA recognizes that recognizes that public documents may contain confidential information, and specifically provides that in the event certain public records contain confidential information, those records should be redacted. NRS 239.010(3). Requiring redaction of confidential information furthers the purpose of the NPRA: “foster[ing] democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law.” NRS 239.001(1). Requiring redaction in lieu of inspection also furthers another goal of the NPRA that the district court touched upon in its Disclosure Order: “provid[ing] the press with the ability to obtain and publish information about issues that affect the public interest and information about the conduct of governmental officials.” (7AA001317.) Inspection would not sufficiently further these goals. Given the great level of interest in the 1 October shooting, only permitting in-person inspection would not maximize public access. Allowing the media to obtain copies allows broader dissemination and, thus, broader access.

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C. METRO HAS WAIVED ITS RIGHT TO RECOVER ANY EXTRAORDINARY USE FEES.

A substantial portion of Metro’s Opening Brief is dedicated to arguing that the district court erred in blocking its efforts to charge the Media Litigants usurious fees²⁰ for the “extraordinary use” of its personnel in producing the requested records. (See OB, pp. 24-32.) As discussed in the section below, Metro’s arguments fail for several reasons. However, this Court need not even address the substance of Metro’s claims because, by its own conduct, Metro has waived any right to claim any fees for extraordinary use.

First, as Metro acknowledges, NRS 239.055(1) required it to provide the Review-Journal with a written estimate of its fees prior to preparing the requested records. (See OB, p. 7 (“Prior to beginning production on records requests that would require extraordinary use, LVMPD must inform the requester of the estimated fee.”)) Metro, however, failed to provide the Review-Journal with such a written estimate. Second, the Costs Order specifically required Metro to “provide the Media with an estimate of the allowable fees that are charged to the Media, consistent with this Order, within three (3) business days from the date of this Order.” (7AA001330.) Metro has never provided the Review-Journal with such an estimate.

²⁰ As the district court noted in the Costs Order, Metro proposed charging the Media Litigants a fee of anywhere from \$233,750.00 to \$458,159.00 just for production of the BWC footage. (7AA001330.)

Third, Metro’s affirmative conduct has resulted in a waiver of any ability to charge the Review-Journal fees for extraordinary use. The district court’s Orders specifically direct Metro to produce the requested records directly to the Media Litigants. (See 7AA001321 (ordering Metro to “make any and all public records subject to this proceeding available at Metro’s office for review by Petitioners); *see also* 7AA001330 (“Metro must begin its production of records to the Media [Litigants] within three (3) business days from the date of this Order.”).)

Rather than complying with these specific provisions of the Orders, starting on May 23, 2018, Metro began releasing responsive records not just to the Media Litigants (as directed by the Orders), but to any media entity, regardless of whether they were parties to the instant litigation, and regardless of whether they made any records requests. Notably, Metro has not charged any of those media entities for costs related to production. By releasing the public records free of charge to the world-at-large, Metro put every media outlet in the world on identical footing with regard to the records. But only the Review-Journal and the Media Coalition are expected to pay, and only because the Review-Journal and the Media Coalition dared to exercise their rights under the NPRA and the First Amendment. Because Metro self-selected to engage in this program of mass dissemination, this Court should find that Metro has waived its rights to recover any costs.

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Moreover, Metro’s complaints about the cost of producing the BWC footage is a problem of its own making. As discussed above, the Media Litigants offered solutions to Metro that would have mitigated production costs—such as offering to agree to in-person inspection and offering to work with counsel for Metro to narrow requests—but Metro rebuffed those offers, opting instead to make serial, cattle call productions of BWC footage to the public at large.

D. METRO CANNOT OBTAIN COSTS FROM THE MEDIA LITIGANTS BECAUSE DOING SO WOULD VIOLATE EQUAL PROTECTION AND THE FIRST AMENDMENT.

Metro cannot provide the records free-of-charge to the world-at-large—including to media outlets that have not even made any requests for records—and require the Media Litigants (and the Media Litigants alone) pay for their production. Doing so violates Petitioners’ right to Equal Protection under the law, as Petitioners have been “intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 1074, 145 L. Ed. 2d 1060 (2000) (citation omitted). Now that many of the records at issue have been released, the only difference between the Media Litigants and other media outlets is that Media Litigants had the gall to vindicate their rights under the NPRA in court. In essence, Metro has turned Petitioners into a “class of one” via its “spiteful effort to ‘get’ [them] for reasons wholly unrelated to any legitimate state objective.” *Olech v. Vill.*

of Willowbrook, 160 F.3d 386, 387 (7th Cir. 1998), *aff’d*, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000). It should go without saying that punishing the Media Litigants for taking Metro to court—which would not have been necessary if Metro had complied with the NPRA from the start—is unrelated to any legitimate state objective.

Moreover, Metro’s punitive response to the Orders and Media Litigants’ efforts to gain access to records may also constitute First Amendment retaliation. In addition to protecting against viewpoint discrimination and First Amendment retaliation, the Constitution, through the Equal Protection Clause, protects against discriminatory access to public forums or information. *See, e.g., Telemundo of Los Angeles v. City of Los Angeles*, 283 F. Supp. 2d 1095, 1102–04 (C.D. Cal. 2003) (granting Telemundo’s “request for a preliminary injunction granting equal camera positioning, equal number of cameras, equal truck positioning, equal access to stage audio, equal ‘access’ credentials, equal access to production meetings, and equal access to rehearsal meetings.”); *McCoy v. Providence Journal Co.*, 190 F.2d 760, 766 (1st Cir. 1951) (“the refusal of the defendants to accord the plaintiffs their right of inspection [under state public records law] while granting such right to a competitor, the Pawtucket Times, constitutes a denial of equal protection of the laws which gives rise to a case or controversy within federal jurisdiction ...”); *American Broadcasting Companies v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir.1977) (holding

that ABC could not be excluded from post-election activities at campaign headquarters where other members of the press were granted access because “once there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable”).

E. THE DISTRICT COURT CORRECTLY INTERPRETED NRS 239.055 TO LIMIT METRO’S EXTRAORDINARY USE FEES.

For the reasons set forth below, the district court did not err in limiting the Extraordinary Use Fees demanded by Metro.

1. The Costs Metro Seeks Are Not Even “Actual Costs” Under the NPRA, and Therefore Cannot Be Costs for “Extraordinary Use.”

Metro argues that it is just seeking its reasonable, actual costs. (*See, e.g.*, p. 30 (“....LVMPD is permitted to charge for staff time... so long as the staff time is reasonably and actually incurred by LVMPD.”).) However, it is seeking compensation for items such as staff time it would pay anyway. (*See* OB, pp. 14-15.) NRS 239.005(1) defines “Actual Costs” as a “direct cost related to the reproduction of a public record.” The costs Metro seeks—for “extraordinary use of personnel” in determining what redactions can be made to public records—are not direct costs related to the reproduction of a public record. They are direct costs related to *preventing* the reproduction of portions of a public record. Because these putative “costs” are not “Actual Costs” under the NPRA, they cannot be part of the

“Extraordinary Use” fee which must be based upon “the cost that the governmental entity actually incurs.” NRS 239.055(1).

Furthermore, Metro’s putative costs were incurred by employees already in Metro’s employ using software already licensed for use by Metro. (OB, p. 14) Because those are costs Metro would have incurred regardless of someone requested BWC footage, Metro did not actually incur any costs for the extraordinary use of its personnel or technological resources. To hold otherwise would allow governmental entity to repeatedly charge requesters fees for one-time purchases (such as software), which is necessarily a restriction on access to public records which the NPRA mandates be construed narrowly. Purchasing hardware and software and hiring employees necessary to fulfill a governmental entity’s duties with regard to public records (which, as noted above, was not something Metro was required to do here), should not entitle governmental entities to a windfall if the governmental entity happens to use these resources to respond to multiple public records requests.

2. The NPRA Does Not Allow for Hourly Fees and the Costs the Government Can Levy Are Limited.

The plain language of the NPRA delineates the permissible fees an entity may charge for production of public records. As Metro observes in its Opening Brief, courts “should refrain from adding or altering language within a statute to accomplish a purpose not on the face of the statute.” (OB, p. 33 (citing *State Indus. Ins. System v. Bokelman*, 113 Nev. 1116, 1122, 946 P.2d 179, 183 (1979).))

Nonetheless, Metro contends that this Court should read the word “copy” out of the extraordinary use provision (OB, p. 26) and read into the NPRA an unwritten entitlement to charge an hourly fee for essentially any work performed by Metro’s personnel in responding to a records request. That interpretation is at odds with the NPRA’s plain language, the express purposes of the NPRA as stated in the NPRA itself, and the Legislature’s express directives regarding interpretation.

NRS 239.052 allows the government to charge a fee for providing a copy, but that fee cannot exceed the “actual cost” of doing so. “Actual cost” is defined as follows:

“Actual cost” means the direct cost related to the reproduction of a public record. The term does not include a cost that a governmental entity incurs regardless of whether or not a person requests a copy of a particular public record.

NRS 239.005(1). Thus, costs such as staff time are not even routine costs that are permitted, let alone “extraordinary costs.”

NRS 239.055 also allows for an additional fee when “a request for a copy of a public record would require a governmental entity to make extraordinary use of its personnel or technological resources.” NRS 239.055(1). In such an event, to provide a copy, “the governmental entity may, in addition to any other fee authorized pursuant to this chapter, charge a fee not to exceed 50 cents per page for such extraordinary use.” *Id.* As a further limitation, the Legislature also provided:

The fee charged by the governmental entity must be reasonable and must be based on the cost that the governmental entity actually incurs for the extraordinary use of its personnel or technological resources.

Id. Thus, the NPRA’s fee provisions only allow a government to charge: (1) for copies; (2) for the actual costs of reproduction incurred to make a copy; and (3) *if* extraordinary use of technological or personnel resources is implicated, a fee that: (a) is reasonable; (b) based on the actual costs incurred; and (c) does not exceed 50 cents per page.

These are the only fees provided for, other than fees specific to inapplicable matters. *See* NRS 239.053 (transcripts of administrative proceedings); NRS 239.054 (geographic information systems). While these other fee provisions are inapplicable, their inclusion reflects that the Legislature intended to comprehensively address fees, and an entitlement to other fees and costs cannot be read into the NPRA. Moreover, a review of the fee provisions makes clear the costs that a governmental entity can recoup are costs associated with *providing information* to a requester—not withholding it.

Limiting the extraordinary use fee to 50 cents per page for copies places clear restrictions on when such a fee—which is only supposed to apply in “extraordinary” circumstances—can be charged. In short, just because the NPRA does not provide for the fees Metro thinks is it entitled to, that does not mean that the NPRA is ambiguous. Thus, the legislative history is irrelevant. *State v. Lucero*, 127 Nev. 92,

95, 249 P.3d 1226, 1228 (2011) (“The starting point for determining legislative intent is the statute’s plain meaning; when a statute “is clear on its face, a court cannot go beyond the statute in determining legislative intent.”) (citation is omitted). It is especially inappropriate to read restrictions on access—which fees are—where the Legislature has seen fit to make the NPRA’s purpose and mandates regarding statutory interpretation explicit in the text of the statute.

Metro cites to a single sentence from this Court’s opinion in *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608 (2015) to support its assertion that it can charge an hourly rate for redactions. (OB, p. 24.) Its reliance is misguided. In *Blackjack*, the petitioners requested all call record details from telephones used by inmates at the Clark County Detention Center from the Las Vegas Metropolitan Police Department. *Id.* at 611. Those services were provided by CenturyLink, a private telecommunications provider. *Id.* at 610.

This Court found that “actual costs” (see NRS 239.055) were properly awarded as costs pursuant to NRS 239.052(1) (allowing for actual costs associated with copies):

The district court’s requirement that Blackjack pay LVMPD’s costs of production is consistent with NRS 239.052(1) (2011), which provides that “a governmental entity may charge a fee for providing a copy of a public record ... [that shall] not exceed the actual cost to the governmental entity” of producing the record.

Id., at 614, fn. 5. The Court did not, however, address extraordinary use. In fact, the district court's Costs Order is fully consistent with this Court's holding in *Blackjack* because it directs the Media Litigants to pay Metro's recoverable costs.

3. Charging for a Privilege Review Is Inconsistent with the NPRA's Purpose and Mandates.

Metro asks this Court to hold that NRS 239.055 allows it to charge the Review-Journal and the Media Coalition for time expended by its personnel in redacting records. (See OB, pp. 26, 31-32.) Metro's arguments, however, ignore the presumed interest in access explicitly set forth in the NPRA as well as the fact that reporting on public records assists in promoting transparency in furtherance of NRS 239.001.

First, the NPRA mandates that a governmental entity must assert specific claims of privilege within five business days (NRS 239.0107(1)(d)), which negates any argument that Metro can simply demand money for its employees to go through records and conjure up reasons to withhold them.

Second, requiring a requester to pay for a privilege review is at odds with the NPRA. NRS 239.0113(2) plainly states that if "[t]he governmental entity that has legal custody or control of the public book or record asserts that the public book or record, or a part thereof, is confidential, the governmental entity has the burden of proving by a preponderance of the evidence that the public book or record, or a part thereof, is confidential." Likewise, as detailed above, this Court's case law squarely

places the burden on the governmental entity to establish that a record is confidential. *See, e.g., Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628. It would be inconsistent with this burden and the nature of the NPRA to require the requester to pay for privilege review and redactions.

Third, on a common-sense level, it would be unfair and run afoul of the letter and purpose of the NPRA to make a requester pay for a governmental entity to keep records secret. A requester should not be in the position of paying for personnel time spent on keeping public records from public view and delaying rightful access to information about the conduct of government and the expenditure of taxpayer funds. The NPRA and this Court's precedent explicitly mandate that the provisions of the NPRA be interpreted liberally to facilitate access to public records. NRS 239.001(2); *see also Gibbons*, 127 Nev. at 878, 266 P.3d at 626. "Conversely, any limitations or restrictions the public's right of access must be narrowly construed." *Id.* (citing NRS 239.001(3)). Because redaction is a mechanism for restricting requesters' access to information in public records, requesters should not have to pay for associated fees.²¹

4. The Legislative History Does Not Support Metro's Interpretation of NRS 239.055.

Even if it were properly considered to rewrite the NPRA, the legislative

²¹ As one district court recognized (1RA001-022), a rule barring the government from charging for redactions is necessary to incentivize the government to keep confidential and non-confidential records separate as much as possible.

history does not support Metro's position. First, Metro's quotation of a discussion between Dan Musgrove and Senator Terry Care during a 2007 Senate Government Affairs hearing on SB 123 (OB, pp. 27-28) is just that: a discussion. That discussion does not aid Metro's argument, as Senator Care's comments indicate a reluctance to charge requesters for staff time spent in fulfilling a records request because "those people work for the taxpayers at that time by satisfying a taxpayer's request for public records." (OB, p. 28.) This is consistent with NRS 239.005(1), which reflects a policy of only allowing the government to charge for its actual costs. Second, 2013 AB 31 did not pertain to the costs provisions of the NPRA—a fact that is mentioned in the portion of the hearing Metro quotes. (See OB, p. 28 (quoting Mr. Munro as stating that any consideration regarding the costs associated with searching public records was "not part of the bill").)

Metro also relies on a 2002 Attorney General Opinion, AGO 2002-32, to support its position that it can charge requesters for the time its employees spend retrieving and copying records. (OB, pp. 26-27.) In addition to having no precedential value²², AGO 2002-32 is of little persuasive value. Although AGO 2002-32 did opine that public records requests requiring more than thirty (30)

²² *Goldman v. Bryan*, 106 Nev. 30, 42, 787 P.2d 372, 380 (1990) (noting that "opinions of the attorney general do not constitute binding legal authority or precedent") (citing *Cannon v. Taylor*, 88 Nev. 89, 493 P.2d 1313 (1972)).

minutes of staff time to retrieve and copy them are “more likely” to be of a “nuisance type” or to “hinder governmental operations,” *see* AGO 2002-32, 2002 WL 2030953 at *7 (Aug. 27, 2002), that threshold is speculative, not absolute or definitive.

Determining whether the time spent is an “extraordinary use” of personnel must be considered on a case-by-case basis. Indeed, finding thirty (30) minutes of staff time to be the defining line in every situation would create disincentives to provide public information, a consequence Senator William Raggio and the 1997 Nevada Legislative sought to avoid. *See id.* (quoting Senator Raggio as stating that “he did not agree with creating a disincentive to provide public information”).)

That discussion is not evidence that taking more than 30 minutes to complete a request is extraordinary and allowing for governmental entities to charge for such allegedly “extraordinary” use is not reconcilable with the text of the NPRA. Moreover, Senator Raggio was right: there should not be disincentives to provide records. The NPRA’s text embodies this—restrictions on access must be read narrowly. NRS 239.001(3). Imagining a fee entitlement not expressly provided for in the NPRA is the opposite of the type of construction this Court must give the NPRA.

5. NRS 239.055 Does Not Apply to BWC Footage and Other Electronic Records.

As the district court correctly found, “NRS 239.055 applies to documents—not electronic records that are not susceptible to being printed out on a page by page

basis.” (7AA001329.) Although Metro accuses the district court of “[i]gnoring the plain language of NRS 239.055” in reaching this conclusion (OB, p. 32), the Costs Order demonstrates the contrary. The district court dedicated several pages of the Costs Order to analyzing the plain language of NRS 239.055 (7AA001326-28), and concluded that the fees provision in the statute did not permit Metro to charge for “pre-copy preparations” of electronic records. (7AA001329.)

This finding is consistent with the plain language of NRS 239.055(1), which provides in pertinent part that “[e]xcept as otherwise provided in NRS 239.054 regarding information provided from a geographic information system, if a request for a copy of a public record would require a governmental entity to make extraordinary use of its personnel or technological resources, the governmental entity may, in addition to any other fee authorized pursuant to this chapter, charge a fee *not to exceed 50 cents per page* for such extraordinary use.” NRS 239.055 (emphasis added). As the district court observed, electronic records such as 911 calls and BWC footage are not capable of being reproduced on a “per page” basis as contemplated by NRS 239.055(1). (7AA001329.)

This reading is also consistent with the other fees provisions of the NPRA. Although Metro asserts that it is “unreasonable and inconsistent with the NPRA” to differentiate between electronic and printed records, the NPRA itself actually makes such a distinction. NRS 239.053, for example, provides that “[i]f a person requests

a copy of a transcript of an administrative proceeding that has been transcribed by a certified court reporter, a governmental entity shall charge, in addition to the ***actual cost of the medium*** in which the copy of the transcript is provided, a ***fee for each page*** provided which is equal in amount to the fee per page charged by the court reporter for the copy of the transcript . . .” NRS 239.053(1) (emphasis added). As the emphasized language demonstrates, the Legislature contemplates two different types of fees an entity can charge a requester—a fee for the actual medium (e.g., a thumb drive or CD) to which a copy of a transcript is produced, and a per-page fee to compensate the entity for the costs charged by a court reporter in producing that transcript.

Metro also asks this Court to interpret two sentences in NRS 239.055 in isolation from each other. Specifically, Metro argues that—notwithstanding the plain “50 cents per page” language in NRS 239.055(1)—this Court should read a subsequent sentence in the same subsection of the statute (“The fee charged by the governmental entity must be reasonable and must be based on the cost that the government actually incurs for the extraordinary use of its personnel or technological research”) as permitting Metro to charge requesters a fee for extraordinary use in producing electronic records. (OB, pp. 34.)

Aside from being muddle-headed, this argument runs afoul of a basic doctrine of statutory construction—*noscitur a sociis*. This doctrine teaches that “words are

known by—acquire meaning from—the company they keep.” *Bldg. Energetix Corp. v. EHE, LP*, 129 Nev. 78, 85, 294 P.3d 1228, 1234 (2013) (quotation omitted). Here, the portion of NRS 239.055(1) Metro cites must be read in conjunction with the other portions of the statute; and those portions specifically provide that fees for extraordinary use must be based on a *per page* cost.

Metro’s argument also ignores another fundamental doctrine of statutory construction—the requirement that statutes must be “construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory.” *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 366, 184 P.3d 378, 386 (2008) (quotation omitted). If the Court were to accept Metro’s interpretation of NRS 239.055(1), the “per page” language of NRS 239.055(1) would be rendered nugatory.

6. Metro Has Not Established That This Case Involves Extraordinary Use.

Although this case does involve a large number of public records, it does not involve the “extraordinary use” of personnel or resources. “[W]ords will be interpreted as taking their ordinary, contemporary, common meaning.” *Perrin v. United States*, 444 U.S. 37, 42 (1979). Because the NPRA does not define “extraordinary use,” this Court must interpret the term based on its common meaning. “Extraordinary” means “[b]eyond what is usual, customary, regular, or common.” Black’s Law Dictionary (10th ed. 2014). As Metro correctly observes, it

is “responsible for responding to public records requests” under the NPRA. (OB, p. 32.) Fulfilling public records requests is a statutory duty and Metro has made all the records at issue in this case available to the public at large simultaneously.

Accordingly, Metro has not established that this case involves “extraordinary use.” Thus, Metro cannot charge the Review-Journal or any other requester to pay for the time its attorneys expend in doing their jobs, or to otherwise pay for the government to meet its burdens under the NPRA.

F. THE DISTRICT COURT CORRECTLY DECIDED TO PERMIT THE REVIEW-JOURNAL AND THE MEDIA COALITION TO PAY THE PRODUCTION COSTS OVER A SIX-MONTH PERIOD RATHER THAN REQUIRING THEM TO PAY THE ESTIMATED FEE UP FRONT.

In its final argument, Metro asserts that the district court erred by permitting the Media Litigants to pay for production of the 1 October records over a six-month period. (OB, pp. 35-36.) However, NRS 239.055 does not contain any requirement that requesters pay a governmental entity in advance for the production of public records; all the statute requires is that a governmental entity provide a requester an estimate prior to preparing the records. *See* NRS 239.055(1) (mandating that “upon receiving [a request that requires extraordinary use of its personnel or technological resources], the governmental entity shall inform the requester, in writing, of the amount of the fee before preparing the requested information”). Accordingly, this Court should not read such a requirement into the statute. *Falcke v. Douglas Cty.*,

116 Nev. 583, 589, 3 P.3d 661, 665 (2000) (holding that “it is not the business of this court to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done”) (quotation omitted).

Moreover, contrary to Metro’s assertions (OB, p. 35), requiring requesters to pre-pay for the production of public records is contrary to the purpose of the NPRA—“foster[ing] democratic principles by providing members of the public with access to inspect and copy public books and records.” NRS 239.001(1). Metro’s proposal to require prepayment for access to public records would contravene this important purpose by allowing governmental entities to hold records hostage until a sufficiently wealthy requester pays a “ransom” for access.

Finally, rather than cite any specific legal or statutory authority to support its claim of error, Metro spins out three different scenarios: a requester may fail to pick up records, a requester may refuse to pick up records, or a requester may modify a records request mid-production. (OB, p. 36.) Metro offers up no evidence to support that any of these scenarios might occur (or have occurred) here; rather, it relies on vague and unsupported allegations that Metro has previously “faced th[ese] exact scenario[s].” (*Id.*)²³ This is insufficient to support Metro’s claims of error.

²³ Metro also complains that it “lacks a remedy for seeking payment.” (OB, p. 36.) This argument necessarily ignores that if any of the Media Litigants failed to pay the amounts due for production of documents, Metro could simply move the district court for enforcement of the Costs Order.

G. THE DISTRICT COURT ERRED IN HOLDING THAT METRO DID NOT WAIVE ITS ABILITY TO ASSERT ANY CONFIDENTIALITY PRIVILEGES WHEN METRO FAILED TO COMPLY WITH NRS 239.0107.

NRS 239.0107 outlines strict requirements a governmental entity must meet when responding to a public records request. Pursuant to that statute, if a governmental entity intends to deny a records request on the grounds that the record or some part thereof is confidential, it must provide written notice of that fact within five business days, with citation to the specific statutory or legal authority that makes it confidential. NRS 239.0107(1); NRS 239.0107(1)(d).

As discussed above, Metro failed to comply with the requirements of NRS 239.0107(1) by failing to timely respond to the Review-Journal's October 2 and October 15 requests. Metro did not respond to the October 2 requests until October 18, 2017—well after the five business days contemplated by NRS 239.0107(1)(d)—and did not respond to the Review-Journal's October 15 request. (See 1AA000050 (response to October 2, 2017 request).) Although the district court acknowledged Metro failed to comply with NRS 239.0107(1)(d), it excused Metro's failure based on the extraordinary circumstances of the 1 October shooting. (7AA001318.) While the Review-Journal appreciates that the 1 October shooting was an unprecedented event, the unprecedented nature of the incident does not excuse Metro from its obligations under NRS 239.0107(1)(d). The district court's holding to the contrary ignores this Court's precedent regarding strict compliance, and conflicts with the

central purpose of the NPRA.

1. NRS 239.0107(1) Requires Strict Compliance.

In interpreting a statute, “this court considers the statute’s multiple legislative provisions as a whole.” *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007) (quotation omitted). The Court must “construe statutes to give meaning to all of their parts and language, and ... will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation.” *Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003) (quotation omitted).

In general, this Court has held that “a rule is mandatory and requires strict compliance when its language states a specific ‘time and manner’ for performance.” *Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 664, 310 P.3d 569, 572 (2013) (quoting *Leven*, 123 Nev. 399, 407 n. 27, 408, 168 P.3d 712, 717 n. 27, 718); *see also Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. 689, 696, 290 P.3d 249, 254 (2012) (“In general, ‘time and manner’ requirements are strictly construed”) (quotation omitted). In determining whether a statute and rule require strict compliance or substantial compliance, this Court “looks at the language used and policy and equity considerations.” *Leyva v. Nat’l Default Servicing Corp.*, 127 Nev. 470, 255 P.3d 1275, 1278 (2011) (citation omitted). “In so doing, [the Court] examine[s] whether the purpose of the statute or rule can be adequately served in a

manner other than by technical compliance with the statutory or rule language.” *Id.* (citations omitted).

“As with most issues pertaining to statutory construction, our goal is to determine and implement the Legislature’s intent.” *Vill. League to Save Incline Assets, Inc. v. State ex rel. Bd. of Equalization*, 124 Nev. 1079, 1087, 194 P.3d 1254, 1260 (2008). As discussed above, the Legislature’s intent in implementing the NPRA is explicitly stated: it is intended to further democratic principles by ensuring swift access to public records. NRS 239.001(1). Given that the Legislature’s intent is to facilitate quick access to public records, the provisions of NRS 239.0107 require strict compliance.

Moreover, “time and manner requirements are strictly construed.” *Einhorn*, 128 Nev. at 696, 290 P.3d at 254. “[W]hen a statutory time limit is material, it should be construed as mandatory unless the Legislature intended otherwise.” *Vill. League to Save Incline Assets, Inc.*, 124 Nev. at 1086, 194 P.3d at 1259. The plain language of NRS 239.0107 sets forth strict time and manner requirements a governmental entity must follow in responding to a records request. These strict time and manner requirements are intended to facilitate the NPRA’s purpose of “further[ing] the democratic ideal of an accountable government by ensuring that public records are broadly accessible.” *Gibbons*, 127 Nev. 877–78, 266 P.3d at 626. Thus, this Court should strictly construe the time and manner requirements for governmental

responses to records request in NRS 239.0107(1)(d) to further this purpose, even under the extraordinary circumstances present in this case.

2. The Mandatory Requirements of NRS 239.0107 Cannot Be Rendered Nugatory.

“[S]tatutory language should be construed to avoid absurd or unreasonable results.” *Anthony Lee R., A Minor v. State*, 113 Nev. 1406, 1414, 952 P.2d 1, 6 (1997). Furthermore, “no part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided.” *Paramount Ins. v. Rayson & Smitley*, 86 Nev. 644, 649, 472 P.2d 530, 533 (1970) (citation omitted). Because the NPRA was designed to facilitate access to public records, and because it provided specific requirements for a governmental entity’s response to records requests, there must be some penalty for a governmental entity’s failure to comply with those requirements. In this case, the appropriate penalty for Metro’s failure to timely respond to the Review-Journal’s records requests must be a finding that Metro waived its right to assert any of the requested records should be kept confidential.

H. THE PERMISSIBLE REDACTIONS OUTLINED IN THE DISCLOSURE ORDER ARE OVERBROAD AND UNCLEAR.

A central premise of the NPRA is that, unless specifically declared by law to be confidential, all records of a government entity are public records open to inspection or copying. See NRS 239.010(1). Given this premise, any privileges and

limitations on disclosure of public records must be construed narrowly. NRS 239.001(3); *see also* *DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) (“It is well settled that privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly.”) (citation omitted).

In its Disclosure Order, the district court recognized these presumptions. (7AA001318 (“Government records are presumed to be public records. Any restrictions to the public’s right of access to public records must be narrowly applied.”) Despite this recognition, the Disclosure Order permits Metro to redact a wide swath of information, including information that is not presumptively confidential:

IT IS HEREBY FURTHER ORDERED that acceptable redactions shall include individual names (other than government officials), addresses, phone numbers, social security numbers, descriptors of individuals, and social media data for all individuals.

(7AA001321.)

As an initial matter, the Review-Journal recognizes that the redaction of Social Security numbers and telephone numbers from public records may generally comport with Nevada law. *See, e.g.*, Supreme Court Rules Governing Sealing and Redacting Court Records, Rule 2(b)(6) (defining “Restricted personal information” as including Social Security numbers and telephone numbers). However, much of

the other information the Disclosure Order permits Metro to redact is not presumptively confidential.

Individuals' names are not confidential. *Cf. Reno Newspapers v. Sheriff (Haley)*, 126 Nev. 211, 216, 234 P.3d 922, 925 (2010) (holding that names of concealed weapons permitholders are not explicitly confidential); *PERS v. Reno Newspapers Inc.*, 129 Nev. 833, 313 P.3d 221 (2013) (holding that names of retired state employees are not confidential). Nor are social media identifiers privileged or protected by any right of privacy. *Cf. Johnson v. PPI Tech. Servs., L.P.*, No. 11-2773, 2013 WL 4508128, at *1 (E.D. La. Aug. 22, 2013) (“Generally, [social networking site] content is neither privileged nor protected by any right of privacy.”); *Davenport v. State Farm Mut. Auto. Ins. Co.*, 2012 WL 555759 at *1 (M.D.Fla. Feb. 21, 2012) (same); *Hinostroza v. Denny’s Inc.*, No. 2:17-cv-02561-RFB-NJK, 2018 WL 3212014, at *6 (D. Nev. June 29, 2018) (same).

Moreover, the district court’s decision to permit Metro to redact this information is at odds with its finding in the Disclosure Order that Metro had not satisfied its burden to demonstrate the requested records—or any parts thereof—were confidential. As the district court explained, “Metro had a duty to prove, by a preponderance of the evidence, that each public record (or a part thereof) is confidential. ***The Court finds that Metro failed to meet this burden.***” (7AA001318 (emphasis added); *see also* 7AA001319 (“The Court concludes that Metro failed to

prove by a preponderance of the evidence that any of the requested public records are confidential.”).) Given these findings, the district court’s decision to permit Metro to redact information that is not presumptively confidential was error.

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT REQUIRING METRO TO PROVIDE A PRIVILEGE LOG.

As discussed above, although the district court granted the Media Litigants’ petitions, it did not grant the Review-Journal’s request that the court order Metro to produce a privilege log identifying any documents it was withholding and the specific bases for each withholding. This was an abuse of discretion.

In *Gibbons*, this Court held that after the commencement of a lawsuit pursuant to the NPRA, a state entity withholding requested records is generally required to provide the requesting party with a log which details the records it is withholding and sufficient information about the basis for withholding each public record or a part thereof. *Gibbons*, 127 Nev. at 882-83, 266 P.3d at 629; see also *id.* at 882 (“[A] claim that records are confidential can only be tested in a fair and adversarial manner, and in order to truly proceed in such a fashion, a log typically must be provided to the requesting party”). Although the Court declined to “spell out an exhaustive list of what such a log must contain or the precise form” a log must take, it held that a log “should contain, at a minimum, a general factual description of each record withheld and a specific explanation for nondisclosure.” *Id.* at 883.

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Based on Metro’s representations, there are thousands of public records that are subject to production pursuant to the Disclosure order, including over 800 interview reports (6AA0001022), over 1,600 911 calls (6AA001021), and 748 hours of BWC footage. (*Id.*) Given this volume of records and the potential redactions Metro has made and will make to these records as it continues to make its general releases, the Review-Journal is entitled to a log describing the information Metro redacts from those records, and the specific bases for the redactions so that the Review-Journal has the ability to meaningfully assess whether they are appropriate. *See Gibbons*, 127 Nev. 873, 882, 266 P.3d 623, 629 (holding that “a claim that records are confidential can only be tested in a fair and adversarial manner, and in order to truly proceed in such a fashion, a log typically must be provided to the requesting party”).

Additionally, the district court’s decision to not require Metro to produce a privilege log conflicts with this Court’s recent decision in *Clark Cty. Sch. Dist. v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 84, 429 P.3d 313 (2018). In that case, the Court adopted a two-part balancing test to determine whether a “nontrivial personal privacy interest” of individuals named in public records may warrant redaction. *Id.* at 320. Under that test, the government must first “establish a ‘personal privacy interest stake to ensure that disclosure implicates a personal privacy interest that is nontrivial or ... more than [] de minimis.’” *Id.* (quoting *Cameranesi v. U.S.*

Dep't of Defense, 856 F.3d 626, 637 (9th Cir. 2017)). If the governmental entity meets that burden, the requester must then “show that the public interest sought to be advanced is a significant one and that the information [sought] is likely to advance that interest.” *Id.* Because the district court did not require Metro to provide a privilege log (and because Metro has never communicated to the Review-Journal what it is redacting or why), the Review-Journal has no way of determining whether each of the redactions Metro has made to the records it has released so far were necessary to protect “nontrivial personal privacy interest.” Accordingly, the district court’s denial of the Review-Journal’s request for a privilege log was error.

J. THE DISTRICT COURT ERRED IN HOLDING THAT A DISPATCH LOG IS A “GEOGRAPHIC INFORMATION SERVICE” AS DEFINED BY NRS 239.054.

As discussed above, in its Costs Order the district court directed that Metro could charge the Media Litigants pre-copy preparation fees for producing a dispatch log. (7AA001329; 7AA001330.) In making this determination, the district court held that the dispatch logs requested by the Media Litigants are “geographic information systems” as defined by NRS 239.054. (7AA001329.) While the Review-Journal does not dispute that Metro’s computer-aided dispatch (“CAD”) system is a likely a “geographic information service” as defined by NRS 239.054, the district court’s holding was erroneous because the Review-Journal was not asking for a copy of the CAD system; it only requested print-outs of dispatch logs.

NRS 239.054 provides in pertinent part as follows:

1. A fee for the provision of information from a geographic information system may include, in addition to the actual cost of the medium in which the information is provided, the reasonable costs related to:

- (a) The gathering and entry of data into the system;
- (b) Maintenance and updating of the database of the system;
- (c) Hardware;
- (d) Software;
- (e) Quality control; and
- (f) Consultation with personnel of the governmental entity.

Pursuant to the plain language of the statute, a governmental entity may only charge requesters a fee for the provision of “information” from a geographic information service. NRS 239.054(1). Reading this section in conjunction with sections (1)(a) through (f), NRS 239.054 is intended to allow governmental entities to request fees from a requester for providing electronic services and products—not printed material such as a dispatch log. For example, NRS 239.054(1)(b) allows a governmental entity to charge a reasonable fee for maintaining and updating a database, and subsections (c) and (d) allow an entity to charge a requester for hardware and software. This is not what the Review-Journal requested; all that the Review-Journal asked Metro to provide was dispatch logs related to the 1 October shooting.²⁴

²⁴ In correspondence with counsel for Metro, counsel for the Review-Journal provided a representative sample of the dispatch log reports it was seeking. (*See* 1 RA107 (email correspondence); 1 RA109-156 (sample dispatch log report).) As indicated in counsel’s correspondence (1RA107), Metro routinely provides dispatch log reports to the media.

(1AA000038-41.) Thus, the portion of the Costs Order which permits Metro to charge the Review-Journal for dispatch logs must be vacated.²⁵

K. THE DISTRICT COURT ERRED IN FAILING TO CONDUCT AN EVIDENTIARY HEARING BEFORE DETERMINING WHETHER METRO WAS ENTITLED TO ANY COSTS.

Finally, the district court erred in failing to conduct an evidentiary hearing prior to permitting Metro to charge the Media Litigants for costs associated with production of the 1 October records. As discussed above, Metro has never provided any information documenting the actual costs it would incur in producing the records. All that Metro submitted in support of its requests for costs was a self-serving declaration from one of its employees. ((See 7AA001306-1309; *see also* OB, pp. 13-15.) Thus, neither the district court nor the Media Litigants have ever had an opportunity to assess whether the costs Metro insists it will incur in producing records are accurate, reasonable, or necessary.

IX. CONCLUSION

This Court should dismiss Metro's appeal of the Orders as moot because of Metro's decision to disobey the Orders and to instead make the very same records at

²⁵ Moreover, the legislative history of NRS 239.054 belies the district court's conclusion. *See* <https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1997/AB214,1997.pdf>

issue in this case generally available to the public—for free. Even if Metro’s appeal were not moot, it has waived its right to collect fees due to its disobedience of the orders. Moreover, the First Amendment and Equal Protection Clause prohibit Metro from charging only the media litigants for access to records Metro has made available to the public. The district court also properly limited Metro’s extraordinary use fees—fees that it has never actually provided evidence for and xx The district court also correctly decided to permit the Media Litigants to pay the production costs over a six-month period rather than requiring payment of the fees up front. This requirement dovetailed with a process of providing estimates and Metro would not have ended up stuck holding the bag if it had complied the Cost Order.

Just as Metro’s challenge to the Costs Order fails, so does its challenge to the Disclosure Order. The district court correctly required production of body-worn camera footage and Metro has not established (and has not disclosed) what needs to be redacted. Metro’s interpretation of the BWC statute ignores the plain language of the statute. In fact, because Metro has already generally released the BWC footage with redactions, it cannot possibly be said that the footage “contains confidential information that may not otherwise be redacted,” NRS 239.830(2)(b). Moreover, due to the great interest in 1 October by many members of the public, it is simply not feasible to require that everyone inspect the records in person. Allowing dissemination (and full review of copies by the media) better promotes transparency.

While the district court generally properly ruled in the Media Litigants’ favor, it did make some errors that this Court should address. First, the district court erred in holding that Metro did not waive its ability to assert any confidentiality privileges. When Metro failed to comply with NRS 239.0107(1)(d). Second, the permissible redactions outlined in the March 2, 2018 Disclosure Order are overbroad and unclear, and the district court abused its discretion by not requiring Metro to provide a privilege log to justify its redactions and withheld records. The district court erred in holding that a dispatch log is a “geographic information service” as defined by NRS 239.054 because the statute is intended to allow governmental entities to request fees from a requester for providing electronic services and products—not printed material such as a dispatch log. Finally, the district court erred in holding that Metro was entitled to recoup costs associated with production of the records without first holding an evidentiary hearing.

DATED this 5th day of December, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to Nev. R. App. P. 28.2:

I hereby certify that this brief complies with the formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5) and the type style requirements of Nev. R. App. P. 32(a)(6) because the RESPONDENT/CROSS-APPELLANT LAS VEGAS REVIEW-JOURNAL'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL has been prepared in a proportionally spaced typeface (14 point Times New Roman font).

I further certify that this RESPONDENT/CROSS-APPELLANT LAS VEGAS REVIEW-JOURNAL'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL complies with the type-volume limitation of Nev. R. App. P. 28.1(e)(2)(B)(i) because it contains 16,627 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 5th day of December, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONDENT/CROSS-APPELLANT LAS VEGAS REVIEW-JOURNAL'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL was filed electronically with the Nevada Supreme Court on the 5th day of December, 2018. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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